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No. 702

In the Supreme Court of the United States

OCTOBER TERM, 1964

LOUIS H. COMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a; R. 9–21) is reported at 336 F. 2d 856.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1964 (R. 23). On October 17, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 20, 1964. The petition was filed on November 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence required an instruction on entrapment.

757-246—64

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Maryland on four counts of an indictment charging him with conducting and receiving wagers in a lottery operation without paying the special occupational tax, without securing the required occupational tax stamp, without registering to carry on a lottery business, and without furnishing requisite information concerning the lottery operation to the District Director of Internal Revenue (App. I, 3–5, 12).[1] Petitioner was given aggregate sentences of imprisonment for 18 months and fines of $8,100 (App. I, 13). On appeal the conviction was affirmed (R. 2–3, 23).

The pertinent evidence may be summarized as follows:

In March 1963, Pozecki, an Internal Revenue agent working under cover in the Baltimore area, was introduced by an informer to one Anapa. Anapa was described as a person who wanted to make some money by soliciting telephone numbers at which Pozecki could place wagers (App. I, 29–30; App. II, 1). Pozecki told Anapa that he was a "lay-off" man working for someone else (not named) and that he wanted to lay off (*i.e.*, place elsewhere) any bets he or his principal could not handle (App. I, 31). Pozecki did not tell Anapa that he wished specific telephone numbers, but only that he was interested in all the numbers Anapa could supply (App. I, 35). It was agreed that Anapa would receive a share of the wa-

[1] App. I refers to petitioner's appendix in the court below; App. II to the government's appendix.

gers he might help Pozecki to place (App. I, 32). From March until June 1963, Anapa furnished Pozecki with approximately twelve telephone numbers where gambling wagers might be placed. For these services Pozecki paid Anapa a salary of from $35 to $50 per week plus expenses ranging from $5 to $15 (App. I, 32–35). Pozecki's undisputed testimony was that Anapa did not know that he was a federal agent (App. II, 8).

On one occasion between June 10 and June 17, Anapa stated, in the course of a telephone conversation with Pozecki, that he was trying to get petitioner's number (App. I, 37). Pozecki had neither asked for the number nor requested Anapa to ask petitioner to take bets (App. I, 35–36). On June 17, Anapa telephoned Pozecki from petitioner's bar, said that he was with petitioner, and that he wanted to give Pozecki a telephone number (PE 2–1700) which petitioner had given him for use in placing horse and numbers bets. Pozecki asked what the odds were, and petitioner told Anapa to tell Pozecki that they were 600 to 1 [2] (App. II, 3–4, 9; App. I, 29). An arrangement was made that weekly settlement on the bets was to be made with petitioner on Mondays at the Gay Nineties Bar (App. II, 5).

On each day from June 18 through June 22, agent Schafer, an associate of agent Pozecki, called PE 2–1700, the telephone number for petitioner's home. Each time a female voice answered and agent Schafer identified himself by the code name of Harry.

[2] An apparent reference to odds on "numbers" wagers.

(App. II, 9–11.) Total bets of $218 were placed over the 5-day period (App. II, 10–11).

On June 23, 1963, at the Gay Nineties Bar, Pozecki told petitioner that he had called the PE 2–1700 number and a female voice had told him to see petitioner about settlement. Pozecki said that he had been betting under the code name of Harry, and that he wanted to pay $218 in settlement for last week's bets. Petitioner accepted $220 in previously recorded bills and gave Pozecki $2 change (App. II, 6–7, 12). At the time of this payment, Pozecki knew that agent Schafer had placed bets with someone at a telephone number listed to petitioner's residence, and another agent, after investigation, had informed Pozecki that petitioner had not secured a special wagering tax stamp (App. II, 5–6; App. I, 42). After leaving the bar to obtain his identification papers and badge, Pozecki returned with two other agents to arrest petitioner. A search of petitioner's person disclosed petitioner's possession of the recorded money (App. I, 40–41; App. II, 8, 13). Petitioner admitted that it was his wife who had been taking bets over the telephone and that he was familiar with the federal wagering tax requirements (App. I, 41; App. II, 8, 13).

Petitioner testified that he agreed to accept numbers bets only after continued insistence by Anapa over a period of about two or three months (App. I, 56–57, 62). Petitioner told his wife to take numbers bets in order to get Anapa "off his back" (App. I, 60). Petitioner admitted that he had been convicted of income tax evasion and had served a penitentiary term from 1953 to 1956 for conspiracy to violate State

lottery laws (App. I, 55–56, 63). Petitioner's wife testified that she took bets when her husband ordered her to do so after Anapa had begged him to take them (App. I, 47). Later she changed her testimony, stating that she took the bets on her own initiative and did not tell her husband that she had been taking them until after his arrest (App. I, 51). Anapa, called as a defense witness, refused to testify on the ground that his testimony might tend to incriminate him (Pet. App. 6a).

At the close of the evidence the court refused to give petitioner's requested instruction on entrapment through inducement by Anapa (App. I, 11–12, 74). The court also denied petitioner's motion to dismiss the indictment on the asserted ground that there was entrapment as a matter of law (App. I, 75).

ARGUMENT

The claim that petitioner's will was overborne by Anapa is hardly credible. Although petitioner testified that Anapa begged him to take bets, it is apparent that petitioner was experienced in book-making and had a prior disposition to commit the offense with which he was charged. Petitioner quoted the odds (600 to 1) that he was prepared to pay on winning numbers and he proceeded to take bets (through his wife, who was also apparently familiar with the procedures) in substantial amounts and on a day-to-day basis. To suggest that all of this was precipitated by Anapa's insistence that he needed a little extra money borders on the absurd.

In addition, the court below was correct in stating that Anapa was not to be considered a government

agent for purposes of applying the rules of entrapment. Those rules rest on the precept that the government should not be permitted to instigate the commission of a crime in order to punish the offender. It has never been suggested that when one criminal induces another to join him in crime, the second may defend on the ground that he was importuned by the first. The law is quite plainly to the contrary. *Crisp* v. *United States,* 262 F. 2d 68 (C.A. 4); *Polski* v. *United States,* 33 F. 2d 686, 687 (C.A. 8), certiorari denied, 280 U.S. 591; *Jindra* v. *United States,* 69 F. 2d 429, 431 (C.A. 5), certiorari denied, 292 U.S. 651; *Gonzales* v. *United States,* 251 F. 2d 298, 299 (C.A. 9).

In the instant case, Anapa, who allegedly importuned petitioner, was certainly not seeking to make a case against him. On the contrary, Anapa thought that his principal was a "lay-off" man. Moreover, Pozecki, the government agent, neither directed Anapa to petitioner nor prompted Anapa to use any means of persuading petitioner to engage in bookmaking. There is accordingly no basis for suggesting that petitioner's offense was instigated by a government agent.[3]

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[3] In *Sherman* v. *United States*, 356 U.S. 369, 373, the inducement for sales of narcotics came from an "active government informer." In both *United States* v. *Sawyer*, 210 F. 2d 169 (C.A. 3) and *Lutfy* v. *United States*, 198 F. 2d 760 (C.A. 9) (Pet. 5), the inducement for the narcotics sales was made by government agents.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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